

FILED

FEB 21 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE DE JESUS GARCIA-
RODRIGUEZ, aka Jesus Garcia-
Rodriguez,

Defendant - Appellant.

No. 05-50100

D.C. No. CR-03-02600-IEG

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

Jose de Jesus Garcia-Rodriguez appeals from the sentence imposed
following his guilty plea conviction for being an alien found in the United States

^{*} This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

subsequent to deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291. Reviewing de novo, *see United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002), we affirm.

Garcia-Rodriguez contends that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the enhancement of his sentence pursuant to 8 U.S.C. § 1326(b) was unconstitutional because he did not admit the prior conviction, nor was the prior conviction proven to a jury beyond a reasonable doubt. This argument is foreclosed by the text of *Apprendi* itself, which expressly carves out an exception for the fact of a prior conviction, *see* 530 U.S. at 490, and by the law of this circuit. *See United States v. Pacheco-Zepeda*, 234 F.3d 411, 415 (9th Cir. 2000); *see also United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005) (stating that the *Pacheco-Zepeda* holding was reaffirmed following the Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005)). We therefore affirm the sentence.

AFFIRMED